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CLIMATE CHANGE AND THE REGIONAL HUMAN RIGHTS SYSTEMS

by Megan S. Chapman*

In last year's *Climate Law Reporter*, Staff Writer Anne Parsons laid out the fundamental case for using a human rights framework to shift the burden for protecting individuals from the negative impacts of climate change to the state.¹ The impetus for that piece was the UN Human Rights Commission's adoption of Resolution 7/23.² In the last year, with the flurry of preparation for the December 2009 round of UN Framework Convention on Climate Change negotiations in Copenhagen ("UNFCCC COP-15"), a number of institutions have joined the call for developing the nexus between human rights and climate change.³ The nexus is meaningful because demonstrating climate change's numerous negative impacts on human rights, particularly for already vulnerable populations, is a way of measuring the harm.⁴ It is also meaningful because it connects this harm to obligations which the state has already undertaken.⁵ Thus, it reveals the potential for using developing supranational human rights legal systems to impose a duty on states to prevent further climate change and protect individuals from its negative impacts.⁶ This piece aims to briefly explore this latter angle on the human rights-climate change nexus: the likelihood that international human rights bodies, particularly the regional human rights systems, will in the foreseeable future hold states accountable for climate change.

International environmental law and climate change negotiations tend to be based on notions of state-to-state consensus and cooperation.⁷ However, there is nothing like the build-up of hopes and ultimate disappointment of the most recent UNFCCC COP-15 negotiations⁸ to leave individuals wishing for some club to hold over the heads of states. Aside from democratic processes or domestic legal remedies, where they exist, regional human rights systems may offer the best forum for individuals to confront states that fail to come to consensus or otherwise take steps to combat climate change.

This is not to say that regional human rights systems have been perfected. The European Court of Human Rights, the Inter-American Court of and Commission on Human Rights, and the African Commission on and newly operational Court of Human and Peoples' Rights each face their own challenges: certain states that accept only limited jurisdiction or no jurisdiction at all;⁹ absence of regional enforcement mechanisms other than diplomatic or political pressure;¹⁰ and consequent reliance on states for compliance with recommendations and execution of binding judgments. Nevertheless, each regional system has developed a mechanism by which individuals may bring complaints against states for failing to respect, protect, or fulfill regionally guaranteed human rights.¹¹

In evaluating the potential fate of a petition based on human rights violations resulting from climate change, each of the three

established systems has its own strengths. Unlike the foundational documents of the other two systems, the African Charter on Human and Peoples' Rights actually recognizes a right to environment.¹² Moreover, the African Commission on Human and Peoples Rights ("ACHPR") has entertained petitions based on violations of this right and found states in violation of their associated obligations.¹³ In a resolution on human rights and climate change issued just prior to COP-15, the ACHPR referenced this "right of all peoples to an environment favourable to their development" under the Banjul Charter, along with other international instruments binding of member states of the African Union ("AU").¹⁴ Using this right as a basis, it expressed concern that the COP-15 negotiations would unlikely incorporate human rights considerations and urged the heads of AU member states to ensure that human rights standards, particularly protections for vulnerable populations, be included in any climate change agreement resulting from the negotiations.¹⁵ The only indication of the ACHPR's inclination to hold states accountable for climate change, however, was in noting that "climate change is principally the result of emissions of greenhouse gases, which remain relatively high in developed countries."¹⁶

The Inter-American Commission on Human Rights ("IACHR") is the only of the regional bodies that has squarely faced a petition based on the human rights consequences of climate change. In 2005, Sheila Watt-Cloutier of the Inuit Circumpolar Conference filed a petition with the IACHR on behalf of "all Inuit of the arctic regions of the United States of America and Canada who have been affected by the impacts of climate change."¹⁷ The petition alleged that the United States, the leading greenhouse gas ("GHG") emitter in the world, is the greatest contributor to climate change, which threatens the enjoyment of numerous human rights guaranteed by the American Declaration of the Rights and Duties of Man¹⁸ to the Inuit living in the arctic regions.¹⁹ The specific rights identified include their rights "to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home."²⁰ The petitioners argued that U.S. government should be held accountable for these violations to the extent that they result from both its acts—enabling or contributing disproportionately to GHG emissions—and its omissions—failing to take meaningful steps to reduce GHG emissions and otherwise counteract climate change.²¹

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This petition faced several notable challenges. First, because the United States has not accepted the jurisdiction of the Inter-American Court of Human Rights, the petition could only be brought before the IACHR, which may issue recommendations but not binding judgments.²² Secondly, as would be the case with any lawsuit relating to responsibility for climate change, it faced the tremendous burden of proving legally sufficient causation between the harm resulting from climate change and the acts and omissions of the U.S. government. The petition did an admirable job of laying out the scientific evidence for the connection between GHG emissions and climate change, the U.S. contribution to GHG emissions, the effects of climate change on the arctic environment, and the complete dependence of Inuit peoples on the arctic environment.²³

Despite these efforts, the IACHR dismissed the petition without prejudice on November 16, 2006.²⁴ Nevertheless, the IACHR did invite the petitioners, along with the Center for International Environmental Law (“CIEL”) and Earthjustice to a thematic hearing on the issue of global warming and human rights in the Americas on March 1, 2007.²⁵ This hearing offers perhaps the best indication of the challenges that future litigation over human rights violations as consequence of climate change will face before a regional human rights body. The questions from three commissioners addressed (1) how to attribute or divide responsibility among states in the region or even states that are not members of the OAS;²⁶ (2) how the rights violations suffered by the Inuit could be tied more closely to concrete acts or omissions of specific states;²⁷ (3) whether the petitioners had exhausted domestic remedies, a requirement for admissibility in any of the regional human rights systems;²⁸ and (4) what examples of good practices undertaken by states could guide the Commission in making recommendations.²⁹

Counsel for the three organizations responded to each of the questions deftly. To the first, they explained the principle of “common but differentiated responsibility,” as a key component of state responsibility under international economic law.³⁰ To the third, the question of exhaustion of domestic remedies, they explained why there is no comparable legal remedy available in the United States or Canada that would require the government to pay compensation for human rights violations associated with climate change.³¹ To the fourth question, counsel from CIEL pointed to good practices to counteract global warming in several states in the Americas, particularly Brazil.³²

The second question, as articulated by Commissioner Victor Abromovich, seemed to remain most unresolved at the end of the hearing:

Is there a precise form in which the impact you have described very well on fundamental rights can be tied to the actions or omissions of the particular states? . . . [I]n all cases . . . considered by the Inter-American system, there have existed direct actions . . . or the failure to act by the state in the face of a concrete situation, for example . . . forestry in an indigenous territory. Now, the problem you are laying out, without doubt, links to state and non-state actors, but the relationship is much . . . less direct. So, I would like clarification about how there can be a relationship—not just any relationship, a legal relationship, a relationship of responsibility—of the states for violations of the rights that you have very clearly described.³³

This causal connection question presents the greatest gap between precedent cases on environmental damage that have been accepted by the regional human rights bodies and the issue of climate change and resulting human rights violations. Like other current frontiers in regional human rights law, resolution of this question might require either meeting a nearly impossible quantum of proof or bringing a petition against several or all states in a region.

One possible way forward may lie in the approach taken by the European Court on Human Rights (“ECtHR”) in a series of precedents recently identified in a Council of Europe (CoE) report on climate change and human rights. Although the European (Rome) Convention on Human Rights does not affirmatively guarantee a right to the environment,³⁴ the ECtHR has held states accountable for human rights violations resulting from environmental damage in a number of cases.³⁵ Most often, these cases hold the state accountable for failure to protect individuals from actions of third parties, often corporations, and tie the environmental damage to violations of Article 8 (right to family and private life), Article 2 (right to life), and Article 1 (right to property), although other rights have also been implicated.³⁶ As the CoE report pointed out, these cases demonstrate a state’s positive obligation where “inaction would exacerbate [a threat to human rights]” of which the state is aware.³⁷ This obligation could also attach in the climate change context, even though the causal connection between GHG emissions and human rights may be difficult to prove.³⁸



Endnotes: Climate Change and the Regional Human Rights Systems

¹ Anne Parsons, *Human Rights and Climate Change: Shifting the Burden to the State?*, SUSTAINABLE DEV. L. & POL’Y, Winter 2009, at 22.

² UN Human Rights Council Res. 7/23, Human Rights and Climate Change, Mar. 28, 2008, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf.

³ See e.g. Council of Europe, T-PVS/Inf (2009) 4: Human Rights and Climate Change, Document Presented at the 4th Meeting of the Group of Experts on Biodiversity and Climate Change, Apr. 8, 2009 [hereinafter Council of Europe]; UN Human Rights Council Res. 10/4, Human Rights and Climate Change,

Mar. 24, 2009 (basing its recommendations on a report by the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights); African Commission of Human and Peoples’ Rights, ACHPR/Res153(XLVI)09: Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, Nov. 25, 2009 [hereinafter ACHPR Resolution].

⁴ In response to Human Rights Council Resolution 7/23, the Office of the UN High Commissioner for Human Rights conducted a detailed analytical study, inviting submissions from states, intergovernmental and nongovernmental organizations, national human rights organizations, and other experts, on the implications of climate change for the enjoyment of human rights. The results were submitted with its annual report to the Human Rights Council, with Part II using this means of measuring of consequences. *See* Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61, Jan. 15, 2009, pt. II.

⁵ *See, e.g. id.* pt. III (detailing the relevant national and international human rights obligations of states).

⁶ Parallel Workshop on Climate Change and Human Rights, Presented at the 2009 Global Humanitarian Forum Geneva on Human Impact of Climate Change, June 23-24, 2009, *available at* http://www.ghf-ge.org/Portals/0/pdfs/climate_change_and_human_rights_wk.pdf (identifying individual petitions before the regional human rights systems as one of four avenues for legal recourse using human rights law).

⁷ Council of Europe, *supra* note 3, at 4 (describing international environmental law as “a law of co-operation, in which States undertake commitments to support each other[] to address global concerns”).

⁸ Despite positive developments in laying the groundwork for future negotiations, UNFCCC COP-15 failed to result in a comprehensive agreement on climate change. Video: Press Briefing by UNFCCC Executive Secretary Yves de Boer on the Outcome of Copenhagen and the Way Forward in 2010, Jan. 20, 2010, *available at* http://www.youtube.com/watch?v=lgNkkBHIZqg&feature=player_embedded (describing Copenhagen as “not a complete success”).

⁹ For example, the United States has not ratified the American Convention on Human Rights and does not accept the jurisdiction of the Inter-American Court of Human Rights.

¹⁰ In each system, the enforcement of judgments relies on the political weight and moral authority of the Council of Europe, the Organization of American States (“OAS”), and the African Union. Whereas the European system formally charges the Council of Ministers to enforce judgments of the European Court

of Human Rights, the role of the OAS in enforcement is not explicit, but rests on moral weight and political pressure rather than threat of sanctions. *See* Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection?*, 9:4 WASHINGTON U. GLOBAL L. STUD. REV., *available at* <http://ssrn.com/abstract=1437633>. In the African system, “blatant disregard” for the recommendations of the African Commission is more widespread. Fekadeselassie F. Kidanemariam, *Enforcement of Human Rights under Regional Mechanisms: a Comparative Analysis* (2006) (unpublished LL.M. thesis, University of Georgia School of Law), *available at* http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1079&context=student_law (last visited Mar. 3, 2010).

¹¹ *See, generally*, Kidanemariam, *supra* note 10.

¹² Cross-referencing Article 22, which articulates a people’s collective right to economic, social, and cultural development, Article 24 of the Charter enshrines a people’s “right to a general satisfactory environment favourable to their development.” African (Banjul) Charter on Human and Peoples’ Rights, adopted June 27, 1981, arts. 22, 24, *available at* http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf.

¹³ *See, e.g.*, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, Comm. No. 155/96, Decision ACHPR/COMM/A044/1 ¶ 52 (2002) (stating that Article 24 of the Banjul Charter “imposes clear obligations upon a government . . . to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources”), *available at* <http://www.cesr.org/downloads/AfricanCommission-Decision.pdf>.

¹⁴ ACHPR Resolution, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Dec. 7, 2005 [hereinafter Inuit Circumpolar Petition], *available at* <http://www.inuitcircumpolar.com/files/uploads/icc-files/>

FINALPetitionICC.pdf.

¹⁸ American Declaration of the Rights and Duties of Man, Adopted by the 9th International Conference of American States, Bogota, Colombia, 1948, *available at* <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm>. Although the American Declaration was originally adopted as a declaration rather than a binding instrument, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have interpreted it as a source of international obligations for members of the Organization of American States. Inter-American Commission on Human Rights, Introduction, http://www.cidh.org/Basicos/English/Basic1.%20Intro.htm#_ftnref5 (last visited Feb. 16, 2010).

¹⁹ Inuit Circumpolar Petition, *supra* note 9, at 1-9.

²⁰ *Id.* at 5 (noting that the rights violated arise either from the American Declaration or other international human treaties binding on the United States).

²¹ *Id.* at 103-110.

²² Shaver, *supra* note 10.

²³ Inuit Circumpolar Petition, *supra* note 9, at 13-69.

²⁴ Center for International Environmental Law, The Inuit Case, http://www.ciel.org/Climate/Climate_Inuit.html (last visited Feb. 16, 2010).

²⁵ Letter from the IACHR to representatives of the Inuit Circumpolar Conference, EarthJustice, and CIEL, Ref: Global Warming and Human Rights, Hearing – 127th Ordinary Period of Sessions, Feb. 1, 2007, *available at* http://www.ciel.org/Publications/IACHR_Response_1Feb07.pdf.

²⁶ Video: General Hearing on Global Warming and Human Rights, IACHR 127th Ordinary Period of Sessions, Mar. 1, 2007 [hereinafter Hearing], *available at* http://www.oas.org/OASpage/videosasf/2007/03/CIDH_1.wmv (question of Commissioner Paulo Sergio Pinheiro).

²⁷ *Id.* (question of Commissioner Victor Abromovich) (author's translation).

²⁸ *Id.* (question of Commissioner Santiago Canton).

²⁹ *Id.* (question of Commissioner Paulo Sergio Pinheiro).

³⁰ *Id.* (response of Martin Wagner, Earthjustice Managing Attorney).

³¹ Attorney Martin Wagner discussed the then-pending case, *Massachusetts v. Environmental Protection Agency* (EPA), 49 U.S. 497 (2007), in which the U.S. Supreme Court determined that GHGs constitute air pollutants covered by the Clean Air Act and therefore subject to regulation by the EPA. But, as he pointed out, the Clean Air Act does not offer a mechanism for individuals to obtain compensation for violations resulting from government failure to regulate, because under U.S. tort law, a tort claim can only be brought if the government waives its sovereign immunity, which is highly unlikely. Moreover, Wagner pointed out that the rights at issue in this case, such as the right to culture, are not guaranteed in the U.S. constitution or U.S. law. *Id.* (response of Martin Wagner, Earthjustice Managing Attorney). Paul Crowley, the Canadian attorney for Sheila Watt-Cloutier, noted that similar barriers to legal recourse exist in Canada. *Id.* (response of Paul Crowley).

³² Hearing, *supra* note 26 (response of Donald Goldberg, CIEL Senior Attorney).

³³ *Id.* (question of Commissioner Victor Abromovich) (author's translation).

³⁴ Council of Europe, *supra* note 3, at 11.

³⁵ *Id.* at 12.

³⁶ *Id.*

³⁷ *Id.* at 13.

³⁸ Council of Europe, *supra* note 3.